SUPREME COURT, U.S. 73-1221

FILED

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MICHAEL RODAK, JR.,

Supreme Court of the United States

October Term, 1973

No. A-589

WILLIAM L. HESTER, *et al.*,
Petitioners,

vs.

NORMAN WARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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WILLIAM L. HESTER, *et al.*,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

The petitioner herein, Continental Casualty Company, respectfully prays that a writ of certiorari issue to review the final order and opinion of the Supreme Court of the State of Ohio entered on the 14th day of November, 1973 affirming the judgment of the Court of Appeals for the Third Appellate Judicial District of Ohio, County of Allen, Ohio.

OPINIONS BELOW

The opinion (Journal Entry) of the Court of Common Pleas, Allen County, Ohio, overruling the petitioner's Motion for Relief of Sanctions is unreported (A6*).

* "A" references are to the Appendix hereto, which for convenience has been printed under separate cover.

The opinion (Journal Entry) of the Court of Common Pleas, Allen County, Ohio, overruling the petitioner's Motion for Continuance and vacating of the trial date of April 5, 1971 in this case is unreported (A7).

The opinion (Journal Entry) of the Court of Appeals for the Third Appellate Judicial District overruling the Appeal and Motion to Stay the Trial relative to relief of sanctions imposed under Rule 37(B) of the Ohio Rules of Civil Procedure dated April 5, 1971 is unreported (A10).

The entry of the Supreme Court of the State of Ohio denying the petitioner's Petition for Writ of Mandamus is unreported (A12).

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The judgment entry relative to petitioner's Motion for New Trial and for Judgment Notwithstanding the Verdict is unreported (A21).

The opinion (Journal Entry) of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, dated November 8, 1972 incorporating a transcript of the pre-trial hearing of March 17, 1971 with and incorporated into the record instanter is unreported (A23).

The opinion of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is reported in 32 Ohio App. 2d 121 (A25).

The order of the Supreme Court of the State of Ohio dated February 16, 1973 dismissing the appeal of the petitioner herein for the reason that no substantial constitutional question exists is unreported (A37).

The order of the Supreme Court of the State of Ohio overruling the petitioner's Motion for an Order directing the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, to certify its Record dated February 16, 1973 is unreported (A38).

The order of the Supreme Court of the State of Ohio dated March 9, 1973 allowing a rehearing is unreported (A39), as is the letter of the Supreme Court of Ohio dated March 9, 1973 directing that briefs and oral argument be directed solely to the question raised concerning sanctions under Rule 37 of the Ohio Rules of Civil Procedure (A40).

The opinion of the Supreme Court of the State of Ohio affirming the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is reported in 36 Ohio State 2d 38 (A41).

JURISDICTION

Upon the filing of a Motion for Rehearing, the Supreme Court of the State of Ohio allowed a rehearing, as evidenced by the rehearing order dated March 9, 1973 set forth on A39.

By letter of March 9, 1973, set forth on A40, the Supreme Court of the State of Ohio directed that the briefs and argument in this case be directed solely to the question raised concerning sanctions imposed by the Trial Court under authority of Rule 37, Ohio Rules of Civil Procedure.

The opinion and order of the Supreme Court of the State of Ohio dated November 14, 1973 affirming the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is set forth at A41.

The order granting an extension of time within which to file a Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio dated December 12, 1973 is set forth on A50.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Does the imposition of sanctions under Ohio Civil Procedure Rule 37(A), (B) and (D) which prevented the petitioner from introducing evidence on vital issues of agency and scope of employment constitute a final order upon which an appellate court should rule prior to trial to determine if the petitioner is being denied due process of law?

2. Where the respondent had possession of copies of documents and information for approximately 23 months prior to a request to the petitioner to produce such documents and information, along with seven requests for other documents pursuant to Ohio Civil Procedure Rule 34(A) on November 17, 1970, does the offer of the documents in the possession of the petitioner on March 5, 1971, one month before the date set for trial, constitute a willful refusal to comply with a court order to produce such documents on or before February 15, 1971, justifying the court overruling a Motion filed on March 5, 1971 by the petitioner for relief from harsh sanctions imposed upon the petitioner; resulting in the petitioner being prevented from introducing evidence during trial negating employment and scope of employment of the driver (William L. Hester) involved in the collision, when other, more appropriate sanctions could have been imposed upon the

petitioner which would not have denied the petitioner a trial on the merits in accordance with due process of law?

3. Does the imposition of harsh sanctions resulting in an establishment-preclusion order preventing a jury from deciding disputed issues of agency and scope of employment which were central to a determination of the culpability of the petitioner frustrate the major purpose of Ohio Civil Procedure Rule 37, which is to compel discovery, thereby denying the petitioner a trial on the merits, and due process of law; and, depriving the petitioner of property without due process of law?

4. Is the imposition of harsh sanctions preventing the petitioner from introducing evidence negating issues of agency and scope of employment proper when the discovery sought by the respondent involved only the issue of agency?

5. Since both the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, and the Supreme Court of the State of Ohio have stated in Opinions, "no explanation or excuse was offered" by the petitioner to explain a failure to provide documents previously requested by the respondent at a pre-trial hearing on March 17, 1971, whereas the transcript of the hearing (Appendix pp. A58-A72), in the opinion of counsel, sets forth a full explanation of the reasons for failing to produce some of the requested documents, together with the production of the documents in the possession of the petitioner at that time, should not this Court determine whether the explanation dispelled evidence of willful disobedience of a court order and the petitioner should be granted a new trial to afford the petitioner an adjudication of the case on its merits?

6. If the testimony and evidence introduced on behalf of the petitioner, as proferts, proved an independent contractor status existed between the petitioner and the driver (William L. Hester) of the automobile; and, that Hester was not employed at the time of the accident; should not this Court grant the petitioner a new trial, imposing appropriate sanctions upon the petitioner permitting the respondent an opportunity, at the expense of the petitioner, to disprove the testimony and evidence offered as proferts by the petitioner, to afford the petitioner due process of law upon equal terms with the respondent?

CONSTITUTIONAL PROVISIONS, STATUTES AND CIVIL PROCEDURE RULES INVOLVED

The Fifth and Fourteenth Amendments of the Constitution of the United States are involved and, in pertinent part, are set forth hereinbelow, as follows:

> Fifth Amendment, U. S. Constitution:
>
> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .
>
> Fourteenth Amendment, U. S. Constitution:
>
> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Article I, Sections 1, 5 and 16 of the Constitution of Ohio are involved and, in pertinent part, are set forth hereinbelow, as follows:

> § 1. Right to freedom and protection of property.
>
> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and

seeking and obtaining happiness and safety. (See Const. 1802, Art. VIII, §1.)

§ 5. Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912.)

§ 16. Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Ohio Rules of Civil Procedure, Rule 34(A) and (B) are involved and, in pertinent part, are set forth hereinbelow, as follows:

RULE 34. *Production of documents and things for inspection, copying, testing and entry upon land for inspection and other purposes*

(A) *Scope.* Subject to the scope of discovery provisions of Rule 26(B) any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, (1) to inspect and copy, any designated documents * * * which are in the possession, custody or control of the party upon whom the request is served; * * *.

(B) *Procedure.* The request may, without leave of court, be served * * * after commencement of the action * * * upon any other party * * * after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection * * *.

> The party upon whom the request is served shall serve a written response within a period designated in the request, not less than twenty-eight days after the service thereof * * *. The party submitting the request may move for an order under Rule 37 with respect to any * * * failure to respond to the request or any part thereof, * * *.

Ohio Rules of Civil Procedure, Rule 37(A) (2) is involved and, in pertinent part, is set forth hereinbelow. as follows:

> RULE 37. *Failure to make discovery; sanctions*
>
> (2) *Motion.* * * * if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted * * * or fails to permit inspection as requested, the discovering party may move for an order * * * compelling inspection * * *.

Ohio Rules of Civil Procedure, Rule 37(D) is involved and, in pertinent part, is set forth hereinbelow. as follows:

> (D) *Failure of party to * * * respond to request for inspection.* If a party * * * fails * * * (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court * * * on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b) and (c) of subdivision (B)(2) of this rule. * * *
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C).

Ohio Rules of Civil Procedure, Rule 37(B)(2) (a), (b) and (c) are involved and, in pertinent part, are set forth hereinbelow, as follows:

* * * * *

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

STATEMENT OF CASE

On September 4, 1968, the petitioner, Continental Casualty Company, was named as a defendant in an Amended Petition filed on behalf of the respondent, Norman Ward, in the Court of Common Pleas, Allen County, Lima, Ohio, Case No. 52759, together with William L. Hester previously named as a defendant in the case.

The respondent, Norman Ward, was a passenger in a motor vehicle involved in a collision with a vehicle operated by William L. Hester, on December 13, 1966 at 1:10 o'clock A.M. near Lima, Ohio; and, sustained serious injuries as a result of the collision.

Norman Ward claims William L. Hester was employed as an agent of Continental Casualty Company; and, was

acting within the scope of his employment at the time the collision occurred (Record pp. 7-9).

On July 11, 1967, counsel for the respondent took the deposition of William L. Hester, as if upon cross-examination. From the testimony of Mr. Hester and from Answers to Interrogatories submitted by Mr. Hester on or about September 23, 1968, the respondent knew Mr. Hester was not licensed to write any business for the petitioner in Ohio; and, had a business card in his possession which read, "William L. Hester, Special Representative, Fort Wayne District Office, Continental Casualty Company, Bankers Building, Suite A 1, Fort Wayne, Indiana" (Record pp. 9-17).

On December 3, 1968, counsel for the respondent obtained the deposition of Mr. Earl W. Mikels, Agent License Supervisor in the Department of Insurance, Indianapolis, Indiana. Mr. Mikels produced a certified copy of an application for an agent's license for William L. Hester to become a licensed agent in Indiana, a letter authorizing James L. McMahan, Branch Manager, Continental Casualty Company, to requisition the appointment of agents, together with a company requisition for William L. Hester to be a licensed agent for Continental Casualty Company. The application for the agent's license and company's requisition for the license were signed by Mr. James L. McMahan, Branch Manager, Continental Casualty Company. Copies of these documents were attached to the deposition secured by counsel for the respondent (Record pp. 49-50).

On or about November 16, 1970, the case was assigned for trial on April 5, 1971.

On November 17, 1970, respondent served a Request for Inspection of Documents (Record pp. 22-24) on petitioner, pursuant to Civil Rule 34(A) of the Ohio Rules

of Civil Procedure. Three of the documents requested and information relative to the business card of William L. Hester had previously been obtained by counsel for the respondent on or about September 23, 1968 and December 3, 1968, as heretofore indicated.

On January 13, 1971, a hearing was had on the respondent's Motion for an Order to Compel Discovery; and, the petitioner was ordered to produce all documents requested on or before February 15, 1971 (Record p. 25).

On February 16, 1971, the respondent filed a Motion to Impose Sanctions and Brief to which was attached a copy of the application for an Agent's License signed by William L. Hester and James McMahan marked as "Exhibit A" (Record pp. 26-32) which was one of the documents requested by the respondent in his Request for Inspection filed on November 17, 1970 (Record pp. 27-29).

On February 22, 1971, the Court found the Motion to Impose Sanctions "to be well taken"; and, ordered "that the matters regarding the issue of agency and scope of employment contained in plaintiff's Amended Petition be and hereby are established for the purpose of this action . . ." (Record p. 25).

On March 5, 1971, petitioner filed a Motion for Rehearing and Memorandum requesting relief from the sanctions imposed, stating the respondent had, through prior discovery procedures, obtained "part of the information" sought; and, that the petitioner was "ready to provide, to the extent that it is capable of doing so, the remaining information requested" by the respondent (Appendix pp. A4-A5 and Record pp. 34-35).

On March 11, 1971, the case was assigned for a pretrial hearing on March 17, 1971.

On March 17, 1971, the petitioner again requested relief from or modification of the sanctions imposed on

February 22, 1971 in the "interest of justice and fairness to all parties, to permit the fact questions of agency and scope of employment to be litigated and go to the jury," because the petitioner had a good faith and legitimate defense which should be asserted (Record p. 47). All of the documents in the possession of the petitioner which had been requested by the respondent on November 17, 1970 were produced, with the exception of those documents the respondent had previously obtained (Appendix pp. A58-A72 and Record pp. 42-60).

At this time, counsel for the respondent was advised Continental Casualty Company had no lists of prospects (Request 8); and, did not have the Agent's Manual requested, together with the other items, if in existence, requested in Item 10; and stated that as to Request 11, the petitioner did not have a "company policy" requiring all agents, employees or representatives to carry liability insurance on automobiles driven in the course of the company's business (Appendix pp. A58-A72 and Record pp. 52-53).

Counsel for the respondent was also advised the petitioner did not have income tax records or W-2 forms, since William L. Hester was not an employee or on salary, but was paid a commission (Appendix pp. A58-A72, Record pp. 58 and 59).

Copies of directives issued by the petitioner were marked AA and BB and filed with the Court indicating the instructions given to local offices relative to the destruction or retention of some of the documents requested by the respondent (Appendix pp. A58-A72, Record pp. 53 and 158-178).

Request 5 asked for a copy of the Agency Agreement between William L. Hester and Continental Casualty Company. A copy of the Agency Agreement was provided

and is printed in the Record (Appendix pp. A58-A72, Record pp. 154-157).

The Agency Agreement (Par. 3) provides it is not to be construed to create the relation of employer and employee; and, that the agent was free to exercise his own judgment as to persons to solicit and the time and place of solicitation (Record p. 154).

The petitioner also stated everything which could be found or could be produced had been produced in response to the Request for Inspection (Appendix pp. A58-A72, Record p. 58).

On March 19, 1971, by a Journal Entry (Appendix pp. A6-A7), the Court stated:

> "The Court, having considered the exhibits tendered by the defendant, Continental Casualty Company, and having heard arguments of counsel, finds said Motion (request for order relieving said defendant-appellant from the sanctions imposed) is not well taken and the same should be overruled."

On March 31, 1971, the petitioner filed a Notice of Appeal and Motion requesting the continuance of the trial set for April 5, 1971. The stay was requested to permit the Court of Appeals to determine if the imposition of the sanctions constituted a final order from which the petitioner should be relieved to guarantee the petitioner due process of law and those constitutional rights given under the laws of Ohio and the United States of America (Appendix pp. A8-A9, Record pp. 62-65).

The Court of Appeals for the Sixth Appellate Judicial District heard the Appeal, resulting in a Mandate being handed down (filed April 5, 1971) by the Court of Appeals for the Third Appellate Judicial District overruling the Appeal and Motion to stay the trial on the grounds that the Orders and Journal Entries filed in the Court of

Common Pleas "are not final appealable orders." Copy of the Mandate is made part of the Appendix (pp. A10-A11).

On April 5, 1971, the Court of Common Pleas overruled the petitioner's Motion for a continuance of the trial.

On April 5, 1971, the petitioner filed a Petition for Writ of Mandamus, an Amended Petition for Writ of Mandamus, a Motion for Temporary Injunction and Affidavit, and a Petition for Writ of Prohibition in the Supreme Court of Ohio, Case No. 71-233, seeking to have the Supreme Court stay the trial until the petitioner could perfect an Appeal to the Supreme Court of Ohio. The pleadings sought to have the Supreme Court of Ohio consider whether the imposition of sanctions and refusal to grant a continuance of the trial of the case by the Court of Common Pleas (1) constituted an abuse of discretion, (2) failure to afford the petitioner due process of law, and (3) whether the Court of Common Pleas had interfered with or abridged the constitutional rights of the petitioner as guaranteed to it under the laws of Ohio and the United States of America.

The Supreme Court of Ohio found the Amended Petition for Writ of Mandamus should not be allowed; and, that the Petition for Writ of Prohibition should be denied. The entries are set forth in the Appendix (pp. A12-A13).

On April 5, 1971, the petitioner presented an Application for Stay of Proceedings pending the filing of a Petition for Writ of Certiorari to the Supreme Court of the State of Ohio to Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States, to review the denial of the Petition for Mandamus by the Supreme Court of Ohio because of an abuse of discretion by the trial court in imposing unreasonable sanctions upon the petitioner denying the petitioner its constitutional right to a trial

by a jury on the issues of agency and scope of employment of Mr. Hester.

The petitioner, on April 5, 1971, by telephone, was informed Honorable Potter Stewart, Associate Justice, denied the Application for Stay of Proceedings.

When the case was called for trial, April 5, 1971, the petitioner renewed its request to have the court remove the sanctions imposed upon the petitioner. The petitioner stated the issues of agency and scope of employment were crucial to the defense of the case. The petitioner offered to reimburse the Court and the respondent for any expense involved, as well as "to be found in contempt for its failure to produce the documents upon order of this Court . . . to be fined, punished or sanctioned in any other way.", if the sanctions imposed by the Court were removed, since the sanctions imposed removed the only defense the petitioner had, thereby constituting an abuse of discretion; and, were manifestly unjust (Record pp. 75-78).

It was also argued the documents requested could not establish whether the defendant, William L. Hester, was engaged in the scope of his employment at the time of the accident. The petitioner stated the imposition of a sanction declaring the defendant, William L. Hester, was acting within the scope of his employment at the time of the automobile accident was an abuse of discretion and manifestly improper and unjust (Record pp. 77-80).

Before any testimony or evidence was introduced, the Court, after the jury had been impaneled and sworn, stated, in advising the jury as to trial procedures, as follows:

> ". . ., But at this time the Court will inform you that the following, as a matter of law, should be accepted by you as true.

[23] Four: That William L. Hester was the agent for the Continental Casualty Company and was acting within the scope of his authority at the time of the automobile collision on December 13, 1966." (Record pp. 81-82).

After the respondent had rested its case in chief (Record p. 84), the petitioner called the defendant, William L. Hester, for cross-examination, to testify as to the facts surrounding the automobile collision (Record p. 85). Thereafter, the petitioner (Record p. 86) again requested the Court to permit the petitioner to introduce evidence to support its case in chief going to the issues of employment and scope of employment.

The Court ruled that any matters related to the agency and scope of employment of William L. Hester would only be permitted, in the absence of the jury, by way of proferts. (Record pp. 86-87).

Counsel for the respondent stated he did not wish to attend or cross-examine as to the proferts of testimony relating to the issues of agency and scope of employment because the "Court's ruling has already established it * * *." (Record 86-88).

Prior to cross-examining the defendant, William L. Hester, and other witnesses on direct examination to prove Mr. Hester was not employed by the petitioner or acting within the scope of his employment at the time of the accident, it was stated the petitioner was still objecting and respectfully urging the imposition of sanctions interfered with the constitutional rights of the petitioner; and, worked an injustice upon the petitioner (Record pp. 89-90).

Thereafter, the defendant, William L. Hester, was called upon cross-examination by the petitioner, together with other witnesses on direct examination (Chester W. Huffman, Judith Thompson, James McMahan and Ronald

G. Lehman) to prove William L. Hester had been discharged on December 5, 1966; and, was no longer employed as an independent contractor to solicit accident and health insurance policies for the petitioner (Record pp. 90-145). The petitioner also offered exhibits as proferts to support the testimony to the effect, William L. Hester had been discharged on December 5, 1966 and was not acting as an agent or within the scope of his employment on December 13, 1966 when the accident occurred (Record pp. 143-145).

A summarization of the testimony and exhibits referred to above is made part of the Appendix (pp. A15-A18).

Thereafter, the petitioner again requested the Court permit it to offer in evidence all of the testimony, together with the exhibits which had been offered as proferts (Record pp. 144-145).

The Court overruled the request and stated the testimony and exhibits could not be "presented to the jury" by reason of the prior sanctions imposed (Record p. 145).

After the Court charged the jury and the jury retired to deliberate, the petitioner stated it was objecting to the refusal of the Court to permit the introduction of testimony and evidence disproving agency and scope of employment. The petitioner stated no evidence had been introduced to support the issues of agency and scope of employment or the instruction of the Court telling the jury it must accept as fact that William L. Hester was the agent of the petitioner and acting within the scope of said agency at the time of the accident, because such instructions "are contrary to the evidence and testimony introduced" as proferts out of the presence of the jury (Appendix pp. A19-A20).

The petitioner stated the testimony and evidence introduced as proferts conclusively proved the defendant,

William L. Hester, was not the agent of the petitioner; and, was not acting within the scope of said agency when the accident occurred.

The petitioner also said that since the Court required the jury to accept the facts of agency and acting within the scope of said agency, as imposed by sanctions, the charge of the Court was contrary to and a denial of the constitutional right of the petitioner to a fair trial by a jury upon these factual issues (Appendix p. A20).

Thereafter, on April 13, 1971, the jury returned a verdict in favor of the plaintiff and against the defendant, William L. Hester, and the petitioner herein in the sum of Three Hundred Fifteen Thousand Dollars ($315,000.00); and, judgment was entered on the verdict, together with the costs of court (Record pp. 69-70).

On May 7, 1971, the petitioner filed a Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment in the Alternative. Among other Assignments of Error, the petitioner urged that the imposition of sanctions going to the merits of the litigation amounted to abuse of discretion which deprived the petitioner of (1) its right to a jury trial upon all of the issues raised by reason of the happening of the accident; (2) due process of law; and (3) equal justice under the Constitutions of the United States and Ohio. Copy of the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment is printed in the Record (pp. 70-72).

On August 23, 1971, the Court, by Judgment Entry, found the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment, "are not well taken" and overruled same (Appendix p. A21).

On January 17, 1972, the petitioner filed an Amended Notice of Appeal in the Court of Common Pleas appeal-

ing the judgment entered by the Court of Common Pleas overruling the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment, said Appeal being directed to the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio.

Assignments of Error and a Brief to support the Appeal to the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, were filed on May 4, 1972 in the Court of Appeals, wherein it was urged (Assignment of Error No. 2) the Court abused its discretion and erred in imposing drastic and unjust sanctions upon the petitioner, preventing the petitioner from proving the defendant, William L. Hester, was not an agent of the petitioner, acting within the scope of his employment when the accident occurred. It was claimed the petitioner was deprived of a hearing on the merits, contrary to the Constitutions of the United States and Ohio. The Assignment of Error No. 2 filed in the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is made part of the Appendix (p. A22).

On October 25, 1972, the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, in affirming the Judgment of the Trial Court, stated the imposition of sanctions upon the petitioner was not a deprivation of the constitutional right of due process, nor of the constitutional right to trial by jury, where the petitioner had an opportunity to apply for a Protective Order and had not timely offered either an explanation or excuse for failure to comply with a discovery order.

The Court of Appeals also held that where the petitioner had failed to produce documents relating primarily to the issue of agency, the Trial Court did not abuse its discretion or impose unjust sanctions upon the petitioner, in taking the issues of agency and scope of employment from the jury. The Opinion of the Court of Appeals of

the Third Appellate Judicial District of Ohio, Allen County, Ohio, is made part of the Appendix (pp. A25-A35).

On December 4, 1972, the petitioner filed a Notice of Appeal to the Supreme Court of the State of Ohio in the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio. In the Notice of Appeal, the petitioner stated the case involved a substantial constitutional question. The Notice of Appeal to the Supreme Court of the State of Ohio is made part of the Appendix (p. A36).

In a Memorandum in Support of Jurisdiction filed in the Supreme Court of the State of Ohio on January 11, 1973, the petitioner urged there had been no willful failure to produce documents which would justify the imposition of the sanctions imposed upon the petitioner by the Trial Court. The petitioner also claimed it had been deprived of a trial on the merits, contrary to the Constitution of the United States and Ohio which guaranteed the petitioner due process of law, equal protection of the laws and a fair and impartial trial by a jury.

On February 16, 1973, the Supreme Court of the State of Ohio dismissed the Appeal of the petitioner for the reason that no substantial constitutional question exists; and, denied a Motion for an Order directing the Court of Appeals to certify its record (Appendix pp. A37-A38).

On February 22, 1973, the petitioner filed a Motion for Rehearing in the Supreme Court of the State of Ohio requesting that the Supreme Court of the State of Ohio consider Rule 37 of the Ohio Rules of Civil Procedure for the purpose of determining "how far a trial court may go insofar as the severity of sanctions imposed [upon the petitioner] is concerned."

On March 9, 1973, the Supreme Court of the State of Ohio, by Order, allowed the Motion for Rehearing. The

Order of the Supreme Court of the State of Ohio appears in the Appendix (p. A39).

On November 14, 1973, the Supreme Court of the State of Ohio affirmed the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio. The Supreme Court of the State of Ohio stated in its Opinion, 36 Ohio State 2d 38, that a court does not abuse its discretion by ordering a sanction establishing issues sought to be clarified by the production of documents requested [of the petitioner] when the record indicates the failure to comply with an order of the court to produce certain documents is of a willful nature; and, the petitioner, when it finally produced the requested documents, gave no excuse, such as physical disability or the unavailability of all of the requested documents, from which one could conclude the failure was not willful. The Opinion of the Supreme Court of the State of Ohio is made part of the Appendix (pp. A41-A48).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. Under Ohio Law, Is the Order Imposing Drastic Sanctions Upon the Petitioner a "Final Appealable Order" Under Ohio Revised Code, Section 2505.02, Requiring a Court of Appeals and the Supreme Court of the State of Ohio to Determine Whether the Court Abused Its Discretion in Ordering the Sanctions and Deprived the Petitioner of Due Process of Law Prior to Trial on the Issues?

Ohio Revised Code, Section 2505.02, in pertinent part, is as follows:

> "* * * an order affecting a substantial right made in a special proceeding * * * is a final order which may be reviewed, affirmed, modified, or reversed,* * *."

As the Appendix (pp. A8-A9) will show, the petitioner filed a Notice of Appeal in the Court of Common Pleas in Lima, Ohio on March 31, 1971 seeking to appeal the Order of the Court imposing sanctions and the refusal of the Court to continue the case for trial. The basis for the appeal was (1) the belief the imposition of sanctions was a final order, (2) claimed abuse of discretion, (3) failure to afford the petitioner due process of law, and (4) all of petitioner's constitutional rights under the laws of Ohio and the United States to a trial on all the issues in the case.

After a consideration of briefs and argument of counsel, the Court of Appeals for the Third Appellate Judicial District of Ohio overruled the appeal and Motion to Stay the Trial on the grounds that the Orders and Journal Entries filed in the Court of Common Pleas were not "final appealable orders" (Appendix pp. A10-A11).

Thereafter, the petitioner filed a Petition for Writ of Mandamus, an Amended Petition for Writ of Mandamus,

a Motion for Temporary Injunction and Affidavit, and a Petition for Writ of Prohibition in the Supreme Court of Ohio seeking to have the Supreme Court continue the trial of the case in the Court of Common Pleas until the petitioner could perfect an Appeal to the Supreme Court of Ohio. The purpose of the appeal sought to have the Supreme Court of Ohio consider whether the imposition of sanctions was a final order, and together with the refusal to grant a continuance of the trial by the Court of Common Pleas (1) constituted an abuse of discretion, (2) failure to afford the petitioner due process of law, and (3) whether the Court of Common Pleas had interfered with or abridged the constitutional rights of the petitioner guaranteed to it under the laws of Ohio and the United States of America.

Upon consideration, the Supreme Court of Ohio found the Amended Petition for Writ of Mandamus should not be allowed; and, that the Petition for Writ of Prohibition should be denied, as evidenced by the Entries set forth in the Appendix (pp. A12-A13).

The Court of Appeals of the Eighth Judicial District, Cuyahoga County, Ohio, on October 14, 1971, in the case of *Hlavin v. W. E. Plechaty Co.*, 28 Ohio App. 2d 43, 274 N.E.2d 570, held as follows:

> "1. An order awarding expenses and attorney fees, as sanction (Rule 37, Ohio Rules of Civil Procedure) against persons who unjustifiably resist discovery in civil actions, is a final appealable order under R.C. § 2505.02.
>
> * * * * *
>
> "In addition, the appellee raised the question whether the order awarding expenses and attorneys fees is a final appealable order. R. C. 2505.02 permits an appeal from any order affecting a substantial right

made in a special proceeding. The order in this case is such an order and an appeal may be taken from it.

* * * * *

"The method of sanctions adopted by the Rules of Civil Procedure is to require the resisting party to compensate the party seeking discovery for the expenses necessarily incurred as a result of such resistance. However, there is no provision in the rules for punishment of the resisting party, but a compensatory award is apparently thought to be sufficient sanction."

Hlavin v. W. E. Plechaty Co., 28 Ohio App. 2d 43, 274 N.E.2d 570, Paragraph 1 of the Syllabus and pages 44-45.

In view of the conflicting opinions of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, and the Court of Appeals of the Eighth Judicial District of Ohio, Cuyahoga County, Ohio, the petitioner submits the imposition of drastic sanctions by the Court was a "final appealable order" under authority of Ohio Revised Code, Section 2505.02.

It is believed the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio and the Supreme Court of the State of Ohio should have entertained the appeal sought by the petitioner prior to trial to determine whether the Court had abused its discretion and failed to afford the petitioner due process of law and its constitutional right to a trial on all the issues prior to the start of the trial on April 5, 1971 since the sanction order of March 19, 1971 did affect the substantial rights of the petitioner.

II. Imposition of Harsh Sanctions Denying Petitioner a Trial on Crucial Issues of Agency and Scope of Employment Requires Relief or Imposition of More Appropriate Sanctions to Afford Petitioner Due Process of Law, When All Documents in Possession of Petitioner Requested by Respondent Are Produced Before Date for Trial and Prima Facie Negate Agency and Scope of Employment Asserted by Respondent.

This case presents squarely the issues of the petitioner's right to due process of law and a trial to a jury to obtain a judgment on the merits in order that the petitioner will not be deprived of property without due process of law; and, is afforded equal protection of the law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

The case is worthy of review to determine whether a trial court, under Ohio Civil Rule 37 of the Ohio Rules of Civil Procedure, can arbitrarily impose harsh and drastic sanctions upon the petitioner on February 22, 1971, followed by an offer of production of all of the documents requested by the respondent which were in the possession of the petitioner on March 5, 1971, 30 days prior to the scheduled trial date for the case. Particularly is this true, since the Court was requested, on March 5, 1971, to set a hearing by the petitioner seeking relief or modification of the sanctions which had been imposed upon the petitioner. The Court did not schedule the requested hearing until March 17, 1971, which was 15 days before the scheduled trial date. During the hearing on March 17, 1971, the petitioner produced all of the documents in the possession of the petitioner for inspection by the court and the respondent. A full explanation was made by the petitioner to the Court and the respondent for the failure to make discovery prior to March 5, 1971. The petitioner also

stated certain of the documents which had been requested could not be produced by the petitioner since the petitioner never had possession of said documents; and, some of the documents requested were never in existence (Appendix pp. A58-A72).

The petitioner asserts its conduct, as described, relative to the production of documents requested by the respondent does not constitute a willful refusal to make discovery justifying the sanctions imposed.

It is apparent the Court did not make a careful inspection of the documents produced by the petitioner on March 17, 1971, since the Court entered an Order contained in the Minutes of the Court on March 19, 1971, journalized on March 31, 1971, wherein it is stated the Court, "having considered the exhibits tendered * * * and having heard arguments of counsel, finds that said Motion [for relief or modifications of the sanctions] is not well taken and that same should be overruled."

An examination of the "Agency Contract" (Record pp. 154-157) and the ledger sheets taken from the ledger of the Indianapolis office of Continental Casualty Company (Record p. 184) produced by the petitioner establishes the defendant, William L. Hester, was not an employee of the petitioner, but was an independent contractor. See Paragraph 3 of the "Agency Contract", as well as the conditions set forth in Paragraphs 2, 11 and 13 of said "Agency Contract".

The ledger sheets prove the last business submitted by Mr. Hester was secured on November 28, 1966; and, prove no business was submitted by Mr. Hester after November 28, 1966. The last payment of commission to Mr. Hester was entered on a ledger sheet on December 6, 1966. The ledger sheets were available for the respondent and Court to examine on March 5, 1971, one month before

the trial of this case; and, were discussed during the pre-trial hearing on March 17, 1971 (Record pp. 42-61 and Appendix pp. A15-A18 and A58-A72).

In view of the uncontradicted evidence set out in the "Agency Contract" and the ledger sheets, it is submitted the harsh and unreasonable sanctions which were imposed by the Court precluding the petitioner from introducing any evidence during the trial on the issues of agency and scope of employment should have been relaxed by the Court.

The Court should also have taken into consideration the automobile collision occurred on December 13, 1966 at 1:10 o'clock A.M. in Lima, Ohio; and, that the defendant, William L. Hester, was only licensed to sell accident and health insurance in Indiana and did not have a license authorizing him to solicit any business in Ohio.

The Court should have considered whether compelling the harsh sanctions predetermining agency and scope of employment, in such a factual situation, carried out the objectives of the Ohio Civil Rule 37 in promoting justice and "were just."

It is submitted the Court should have considered other more appropriate sanctions, such as (1) holding the petitioner in contempt of court; (2) continuance of the case, ordering the allowance of attorney fees and expenses to the respondent to secure evidence to disprove the denial of the agency and scope of employment of the defendant, William L. Hester, asserted by the petitioner; (3) the assessment of a fine; and, an order requiring the petitioner to pay all fees and expenses charged by expert and non-expert witnesses who were to be used by the respondent resulting from the continuance of the case for trial.

The preclusion sanctions imposed resulted in a miscarriage of justice, as well as a taking of the property of

the petitioner without due process of law, contrary to the intent and purpose of Ohio Civil Rule 37, of the Ohio Rules of Civil Procedure and the Constitutions of the United States of America and of Ohio.

Mr. Justice Harlan in the Opinion deciding *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers,* 357 U.S. 197, *reversing* 243 F.2d 254, at pages 208-209 thereof, made the following points in connection with the exercise of a District Court's powers under Rule 37(B):

> "*Failure* to Comply with Order." (Italics added.) For purposes of subdivision (b) (2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.
>
> *"The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court . . . |which| . . . establish* that *there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action, without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations."*
>
> *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers,* 357 U.S. 197, *reversing* 243 F.2d 254.

John W. McCormac, in his comments relative to Civil Rule 37 at Sec. 10.59, pp. 275-276, OHIO CIVIL RULES PRACTICE, writes as follows:

* * * * *

"The options that the court has for disobedience of its orders are similar to those previously imposed in Ohio. **It should be remembered that the object of the Civil Rules is to promote justice. A claim should be dismissed or a default judgment be granted only when such action is in the interest of justice and other sanctions are inappropriate or ineffective."** (Emphasis supplied.)

Vol. 11, OHIO JURISPRUDENCE (2d), Constitutional Law, as to portions of Section 701, page 51; Section 716, pages 62-63; Section 720, pages 66-67 sets forth the following:

"Thus, due process of law has been defined as law in its regular form of administration through courts of justice, as "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," and as the right to be heard."

11 OHIO JUR. 2d, Sec. 701, p. 51.

"§ 716. Right to "Day in Court."—Due course of law implies and requires that parties litigant shall each have a day in court. What is really meant by 'day in court' is due process of law. Two things are essential to it: first, lawful notice; second, opportunity to be heard. A party is afforded his 'day in court' when he is afforded reasonable notice and reasonable opportunity to be heard.

11 OHIO JUR. 2d, Sec. 716, pp. 62-63.

"A person deprived of property without an opportunity to be heard is denied due process of law. Due course of law means that such course of law shall be

enacted as will require that he, whose property is about to be taken, shall have notice of the time and place of hearing, of what is sought to be appropriated, and an opportunity to be heard in his own behalf. Any law which seeks to deprive him of his property without such proceedings is in direct opposition to the letter and spirit of the Constitution."

11 OHIO JUR. 2d, Sec. 720, pp. 66-67.

The case of *Ketchikan Cold Storage Company v. State of Alaska*, Alaska, 491 P.2d 143, seems to be in point. The Court held:

"3. Discovery

Establishment-preclusion order which prevents full adjudication of case on its merits should be employed only on clear showing that such a course is required.

* * * * *

When a party refuses to comply with a discovery order, Civil Rule 37(b) provides the court with a flexible list of sanctions. *One of the most severe sanctions is the establishment-preclusion order.* When facts at issue in a controversy are established against one of the parties, he is precluded from introducing testimony to refute the points taken to be established. *Thus, in effect, the party has been denied his right to trial on the merits to the extent that matters of fact have been rendered incontestable. The sanction is especially severe when the establishment-preclusion order goes to an issue which is central to the determination of the case.*

* * * * *

The purpose of the Rule 37 sanctions is to effectuate the discovery process. The discovery rules have replaced common law pleading as the means of clarifying issues prior to trial. This permits the factual and legal issues to be brought into specific focus at an early time. It also may lead to settlement or early

termination of lawsuits. Discovery has been quite successful in achieving these goals, and we must not condone any attempt to avoid the process. *We cannot, however, allow a procedural rule to frustrate the major purpose of Rule 37, and in fact all the rules of civil procedure, which is to ensure that an individual may have a just determination of his case upon the merits.*"

Ketchikan Cold Storage Company v. State of Alaska, Alaska, 491 P.2d 143, Paragraph 3 of the Syllabus and pages 146-147.

III. Is a Trial Court Required to Grant a New Trial and Modify Drastic Sanctions Previously Imposed upon the Petitioner When, During Trial, Testimony and Evidence Tendered as Proferts, Impeaches Previous Testimony and Answers to Interrogatories Given by Defendant, William L. Hester, Proving Defendant Hester Was Discharged by Petitioner Seven (7) Days Before the Automobile Accident Occurred on December 13, 1966 at 1:10 O'Clock A.M. and Never Was an Agent Acting Within Scope of Employment to Prevent Miscarriage of Justice and Denial of Petitioner's Fair Day in Court?

The Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, and the Supreme Court of the State of Ohio have based an affirmance of the judgment of the Trial Court upholding a verdict in the sum of Three Hundred Fifteen Thousand Dollars ($315,000.00) against the defendant, William L. Hester, and petitioner on the erroneous conclusion that the petitioner failed to offer any explanation or excuse at the pretrial hearing held on March 17, 1971 for the petitioner's failure to make discovery (Court of Appeals opinion, Ap-

pendix pp. A23-A36, and opinion of the Supreme Court of the State of Ohio, Appendix pp. A41-A48).

As indicated, *supra*, pp. 11-13, on March 17, 1971, the petitioner produced all of the documents in the possession of the petitioner previously requested by the respondent for inspection; and, a full explanation was made concerning the documents which were and were not produced (Record pp. 42-61 and 158-178 and Appendix pp. A58-A72).

It is believed sufficient here to point out the testimony and evidence (Agent's Contract—Record pp. 91-92 and 114-117) offered by the petitioner, as proferts, proved the defendant, William L. Hester, was not an agent of the petitioner, but was an independent contractor working whenever he decided he wanted to work.

The petitioner did not control or establish Mr. Hester's hours, days of work or manner in which he performed his work. Mr. Hester used his own automobile, purchased gasoline and paid for whatever repairs were necessary (Record pp. 92-99 and 110 and Appendix pp. A15-A16).

The testimony also proved Mr. Hester was told on December 5, 1966 he could no longer work for the company. The last business turned in by Mr. Hester was on December 2, 1966. On December 5, 1966, the locks on the Fort Wayne office were changed to prevent Mr. Hester's getting into the office (Record pp. 142-143 and Appendix pp. A16-A17).

All of the testimony and evidence offered by the petitioner proved William L. Hester was not an employee; and, that he was not acting within the scope of his employment as an independent contractor for petitioner on December 13, 1966 at 1:10 o'clock A.M. when the automobile accident occurred.

A summary of the testimony and evidence tendered

by the petitioner as proferts is set forth in the Appendix (pp. A15-A18).

The verbatim testimony and exhibits tendered by the petitioner as proferts appear in the Record (pp. 89-145).

The Interrogatories propounded of the defendant, William L. Hester, answers to said Interrogatories appear in the Record (pp. 11-17). A reading of the testimony and evidence tendered by the petitioner, as proferts, will prove the defendant, William L. Hester, did not truthfully answer Interrogatories 2, 12, 14, 16, 25, 26, 27, 28, 29, and 34; and, did not truthfully answer parts of Interrogatory 11.

It is the opinion of the petitioner the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio and the Supreme Court of the State of Ohio should have carefully examined the testimony and evidence tendered as proferts by the petitioner; and, the answers made by Mr. Hester to the Interrogatories asked of him by the respondent in order to determine whether the petitioner was afforded a just determination of its case upon the merits; and, whether the trial of the case resulted in a miscarriage of justice and a denial of due process of law.

The petitioner respectfully submits that in view of the testimony and evidence tendered as proferts, the untruthful answers made by Mr. Hester to the Interrogatories, the full explanation given by the petitioner on March 17, 1971 concerning the production and nonproduction of documents requested, the absence of a refusal to make discovery as evidenced by the petitioner's offer to produce the documents requested on March 5, 1971, the petitioner has been denied a just determination of its case upon the merits and has been deprived of property without due process of law.

It is respectfully submitted the petitioner is entitled to a reversal of the judgment and a new trial; with appropriate sanctions to be imposed upon the petitioner to allow the respondent every opportunity to secure evidence to disprove the denial of the agency and scope of employment of the defendant, William L. Hester, as asserted by the petitioner.

The reversal of the judgment and the ordering of a new trial in this case is consistent with decisions heretofore handed down by this Court, in order that justice be done between man and man; and, the petitioner is given its right to a trial, on the issues of agency and scope of employment which are central to a fair and just determination of this case.

In the case of *Gill v. Stolow*, 240 F.2d 669, where the trial court ordered a default and heard the case as to damages, refusing to reopen the case to permit testimony and evidence to explain the reason for a failure to appear for a deposition, the Circuit Court of Appeals laid down the following as to the *Court's responsibility "to do justice between man and man"*:

> "The basic issue on the appeal therefore is the court's disciplinary action under Fed. Rules Civ. Proc., rule 37(d), which provides, as its final and most drastic sanction, where a party "wilfully fails to appear" for the taking of his deposition after proper notice, for the entry of "a judgment by default against that party." The proper disciplining of a party under circumstances of default is one of those necessary, but troublesome questions which usually must be left to the control of the trial judge in the course of his administration of his court. Reluctant as we are to interfere, **we feel that this is an occasion where, viewed with the hindsight afforded us by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants**

a trial of the seriously contested issues of fact involved. In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willfull default." (Emphasis supplied.)

Gill v. Stolow, 240 F.2d 669 at page 670.

"The rule (Fed. Rules Civ. Proc. rule 37(b), 28 U.S.C.A.) is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions. **The court, however, should not go beyond** the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior. B. F. Goodrich Tire Co. v. Lyster, 5 Cir. 1964, 328 F.2d 411; see 4 J. Moore, Federal Practice § 37.03 (1969)."

Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, from pages 860-861.

In WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE the following appears:

"§ 2284. Rule 37.

Any failure to disclose, regardless of the reason for it, brings the sanctions of Rule 37 into play, but the reason **for the failure is an important consideration** in determining what sanction to impose. If the failure is because of inability to comply, rather than because of willfulness, bad faith, or any fault of the party, the **action may not be dismissed,** nor a default judgment given, and less severe sanctions are the most that can be invoked. This merely emphasizes the fact that Rules 37(b) and 37 (d) calls upon the court to **"make such orders in regard to the failure as are just,"** and that justice requires that the most drastic sanctions be reserved for flagrant cases.

Accordingly the courts have administered justice with mercy. They have allowed a party a second

opportunity to comply with the discovery rules and orders made under them [72] and have made other conditional orders intended to encourage compliance

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[72] Second opportunity.

Gill v. Stolow C.A.2d. 1957, 240 F.2d 669.

Gusa v. U. S., D.C.N.Y. 1963, 31 R.R.D. 518.

Demeulenaere v. Rockwell Mfg. Co, D.C.N.Y.1959, 23 F.R.D. 686.

Terry Carpenter, Limited v. Ideal Cement Co., D.C. Neb. 1954, 117 F. Supp. 441.

Socha v. Webber, D.C. Alaska, 1951, 11F.R.D. 124.

Dann v. Compagnie Generale Trans-Atlantique Ltd., D.C. N.Y.1939, 29 F.Supp. 330.

*Armstrong v. Biggs, Ky.*1957, 302 S. W.2d 565, 569, citing *Barron & Holtzoff*.

Frank v. Kempczynski, Del.Super, 1952, 90 A.2d 480, 8 Terry 251.

See *Glaser, Pretrial Discovery and the Adversary System*, 1968, pp. 155-156.

When plaintiff was prepared at pretrial conference to answer interrogatories previously submitted to plaintiff by defendant and the plaintiff submitted reason for failure to answer interrogatories, complaint should not have been dismissed for failure to submit answers and **plaintiff should have been permitted to answer instanter.** *Robison v. Transamerican Ins. Co.*, C.A. 10th, 1966, 368 F.2d 37.

Even though personal injury plaintiff failed to produce herself for discovery deposition, court would deny harsh sanction of dismissal as sought by defendant and grant defendant's motion for an order requiring plaintiff to present herself for discovery in near future. *Stricker v. Milwaukee Inn, Inc.*, D.C.Wis.1968, 285 F.Supp. 133, 134, citing *Barron & Holtzoff* (Wright ed.).

When court's order had not detailed extent of analysis required of employer in response to interrogatories *and had not stated what penalties might be applied for non-compliance*, and employer's production of 120,000 copies of personnel records perhaps took the time allowed, adjudication on merits was too severe a penalty for want of full compliance, and full compliance was again ordered. *Lodge 743, Int'l Ass'n of Machinists, AFL-CIO v. United Aircraft Corp.*, D.C.Conn.1963, 220 F.Supp. 19, affirmed C.A.2d. 1964, 337 F.2d 5, certiorari denied 85 S.Ct. 883, 380 U.S. 908, 13 L.Ed. 2d 797.

rather than to punish a failure. [73] They have reasoned that since the relevant subdivisions of Rule 37 use the word "may" they have discretion to refrain from imposing sanctions for such reasons and on such conditions as they see fit.

It should not be concluded from the cases cited in connection with the preceding paragraph that the courts never impose sanctions for failure to comply with the discovery rules. They do impose sanctions, and often quite drastic ones, as the discussion of Rule 37(b) and Rule 37(d) will show. **Nevertheless it is true that the imposition of sanctions has been com-**

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[73] Conditional orders

Motion to vacate default judgment that was entered for defendant's failure to answer interrogatories was granted on condition that defendant file certain answers within 30 days, produce certain books and papers and pay into court $750 for fees, costs and expenses of plaintiff's counsel plus an additional $100 if case did not terminate before specified future date. *Hendricks, v. Alcoa S. S. Co.*, D.C. Pa. 1962, 32 F.R.D. 169.

Dismissal of action because of plaintiff's failure to appear for taking of their depositions denied and they would be allowed to be examined in California upon payment of defendants' counsel fees and necessary expenses. *Republic Productions, Inc. v. American Fed'n of Musicians*, D.C.N.Y. 1962, 30 F.R.D. 159.

Dismissal for failure to attend deposition denied and plaintiff ordered to answer written interrogatories. *Dunn v. Pennsylvania R. Co.*, D.C. Ohio 1951, 96 F.Supp. 597.

Dismissal denied and defendant given the alternative of taking plaintiff's deposition at place fixed by the court or advancing sufficient funds to plaintiff to enable him to get to place originally fixed for deposition. *Ross v. True Temper Corp.*, D.C.Ohio 1951, 11 F.R.D. 307.

When it was uncertain as to whether "applications" log ever existed and junior party in patent interference made determined effort to establish whether such log did exist, and if so, how it could be identified or located, junior party's failure to produce "applications" log was not inexcusable and court would not impose sanctions for such failure. *International Business Machs., Corp. v. Sperry Rand Corp.*, D.C.Del.1968, 44 F.R.D. 10.

paratively rare[76] and that the courts have taken so seriously the admonition of the rule they are to impose only such sanctions as are just that they have been accused of overleniency by some commentators. *Yet it seems especially fitting that courts should make the punishment fit the crime and should not impose a drastic sanction that will prevent adjudication of a case on its merits except on the clearest showing that this course is required. As the draftsman of the Federal Rules wrote:*

> *In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default.*

The courts have recognized this and have exercised their discretion in a fashion intended to encourage discovery **rather than simply to punish for failure to make discovery.**

> Sect. 2284—Discretion of Court in Imposing Sanctions, pages 766-772, Chap. 6, Vol. 8 WRIGHT and MILLER, *Federal Practice & Procedure.*

The sanctions of dismissal and of judgment by default are severe sanctions, and appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts. To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of cases.

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[76] Comparatively rare

"In practice, the case law shows sparing use of the existing sanctions because they are so drastic. Many judges shrink from applying sanctions at all; such measures do not decide cases on their merits." *Glaser, Pretrial Discovery and the Adversary System*, 1968, pp. 154-155.

I suggest that appellate judges believe that a district judge should approach with hesitation the use by him of dismissal sanctions. Where an alternative, less drastic, sanction would be just as effective it should be utilized. For instance, in United States v. Costello, 16 F.R.D. 428 (SDNY 1954), inasmuch as he believed that a default judgment would deprive Costello of U.S. citizenship without a hearing, the trial judge would not enter judgment for the Government by default even though Costello had refused to answer questions put to him at his pre-trial proceedings. Instead, Costello was declared to be in contempt —and was fined. Our appellate court agreed, 222 F.2d 656 (2 Cir. 1955), cert. denied, 350 U.S. 847, 76 S.Ct. 62, 100 L.Ed. 755 (1955), that the lower court action was proper and just."

An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders by Honorable Sterry R. Waterman, United States Court of Appeals for the Second Circuit, 29 FEDERAL RULES DECISIONS, pages 424-425.

See also.

Hovey v. Elliott, 167 U.S. 409;

Hammond Packing Company v. Arkansas, 212 U.S. 322;

Tot v. United States, 319 U.S. 463;

Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1967), 376 F.2d 118, *certiorari denied* 393 U.S. 815, 859;

U. S. v. Costello (2d Cir. 1955), 222 F.2d 656, *certiorari denied* 350 U.S. 847;

Campbell v. Johnson (D.C.N.Y. 1951), 101 F. Supp. 705.

IV. Is the Imposition of Harsh Sanctions Preventing the Petitioner from Introducing Evidence Negating Issues of Agency and Scope of Employment Proper When the Discovery Sought by the Respondent Involved Only the Issue of Agency?

The petitioner submits the documents the respondent requested be produced were documents which only defined the employment relationship between the defendant, William L. Hester, and the petitioner.

It is significant all of the documents requested existed prior to the happening of the accident of December 13, 1966; and, could not possibly lead to the discovery of facts which would determine the basic issue of scope of employment.

Since none of the documents requested by the respondent involved discovery as to whether the defendant, William L. Hester, was engaged within the scope of his alleged employment, the petitioner submits the Court abused its discretion and denied the petitioner due process of law by imposing the sanction which prevented the petitioner from introducing testimony and evidence proving the defendant, William L. Hester, was not acting within the course and scope of his alleged employment prior to and at the time the accident of December 13, 1966 occurred.

> "No absolutely hard and fast rule can be stated which will furnish the complete answer to the problem whether at a given moment an employee is engaged in his employer's business in the operation of a motor vehicle, so as to fix liability upon the employer because of the employee's action or inaction, but rather the result varies with each state of facts. In general, the question whether an employee-driver was acting within the scope of his employment involves an inquiry into the contract of employment

and the relation of his acts at the time of the accident to the service he actually performed pursuant to his employment."

8 AM. JUR. 2d, *Automobiles and Highway Traffic*, § 617, at page 168.

"1. The relationship of principal and agent or master and servant is distinguished from the relationship of employer and independent contractor by the following test: *Did the employer retain control of, or the right to control, the mode and manner of doing the work contracted for?* If he did, the relationship is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor. (Italics supplied.)

2. The rule of *respondent superior* only arises out of the relationship of superior and subordinate and ceases when that relationship ceases to exist; and the reason of it is to be traced to the power of control and direction, which the superior has a right to exercise, and which, for the safety of others, he is bound to exercise, over the acts of his subordinates. (Paragraph four of the syllabus of *Clark v. Fry*, 8 Ohio St., 358, approved and followed.)

3. Where one employs another to do certain work for him, the mere right reserved by the employer to direct as to the quantity of work to be done, or the condition of the work when completed, is not a right to control the mode or manner of doing the work so as to justify the conclusion that the relationship between the employer and the contractor is either that of principal and agent or master and servant. (Paragraph four of the syllabus in *Hughes v. Railway Co.*, 39 Ohio St., 461, approved and followed.)"

Councell v. Douglas, 163 Ohio St. 292, Paragraphs 1, 2 and 3 of the Syllagus.

"The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control, or the right to control, the mode and manner of doing the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor."

Miller v. Metropolitan Life Ins. Co., 134 Ohio St. 289, 16 N.E.2d 447.

CONCLUSION

The petitioner submits the imposition of drastic sanctions which prevented the petitioner from introducing testimony and evidence on two vital issues of agency and scope of employment resulted in a miscarriage of justice and denied the petitioner due process of law, contrary to the Ohio Rules of Civil Procedure and the Constitutions of Ohio and the United States of America.

The testimony, evidence and Exhibits introduced by the petitioner (as proferts) clearly prove the defendant, William L. Hester, was not an agent or acting within the scope of his alleged employment with the petitioner prior to and at the time of the accident.

It is respectfully requested this Court reverse and remand this case for a new trial in order that the petitioner will be afforded its day in court on the merits of the litigation.

Respectfully submitted,

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